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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 795940

ROOSEVELT ESAU TURNER,

Petitioner,

v.

J. P. MITCHELL, WARDEN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF FACTS	2
QUESTION PRESENTED	3
STATEMENT OF THE CASE	3
ARGUMENT	4
CONCLUSION	8
CERTIFICATE OF SERVICE	8

TABLE OF CITATIONS

Cases

	Page
Atwell v. State of Arkansas, 426 F2d 912 (8th Cir. 1970)	6
Freeman v. Slayton, 550 F.2d 909 (4th Cir. 1977)	6
Grundler v. North Carolina, 283 F.2d 798 (4th Cir. 1960)	6
Gryger v. Burke, 334 U.S. 728 (1948)	6
Jackson v. Virginia, ____ U.S. ____, 99 S.Ct. 2781, 61 L.Ed.2d 560 (June 28, 1979)	8
LaBrasca v. Misterly, 423 F.2d 708 (9th Cir. 1970)	6
Land v. Commonwealth, 211 Va. 223, 222 S.E.2d 12 (1970)	7
Miranda v. Arizona, 384 U.S. 436 (1966)	1, 5
Rice v. Sious City Memorial Park Cemetery, Inc., et al., 349 U.S. 70 (1954)	4
Schaefer v. Leone, 443 F.2d 182 (2d Cir. 1971)	6
Tyree v. Lariew, 208 Va. 382, 158 S.E.2d 140 (1967)	6
United States Ex Rel Bleimehl v. Cannon, 525 F.2d 414 (7th Cir. 1975)	6

OTHER AUTHORITIES

Rule 19, Rules of the Supreme Court of the United States	4
C. FRIEND, LAW OF EVIDENCE IN VIRGINIA (1977)	7

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OPINIONS BELOW

There is no reported opinion of the Supreme Court of Virginia; however, the order rejecting the petition for appeal is set forth in petitioner's Appendix "C".

The order, and accompanying memorandum, dismissing petitioner's petition for writ of habeas corpus in the United States District Court for the Eastern District of Virginia, Richmond Division, is set forth in Respondent's Appendix.

The unpublished per curiam decision of the United States Court of Appeals for the Fourth Circuit denying petitioner's appeal of the District Court's decision is set forth in petitioner's Appendix "A".

The order of the United States Court of Appeals for the Fourth Circuit denying petitioner's petition for rehearing is set forth in petitioner's Appendix "B".

JURISDICTION

Petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1254.

STATEMENT OF FACTS

At petitioner's trial on May 19, 1977, his stepdaughter, Artorita Smith Bey, testified that on January 4, 1977, she and Ruth Anna Turner, her mother and petitioner's estranged wife, were at their Fendall Avenue home in Richmond when the petitioner arrived to talk to Mrs. Turner. Shortly thereafter, Mrs. Turner asked Miss Bey to take the petitioner to South Richmond; Miss Bey drove, with Mrs. Turner in the middle and the petitioner on the far side of the front seat. (Tr. at 28-29).

When they reached South Richmond, Mrs. Turner told Miss Bey to stop the car and let the petitioner out instead of taking him to the place he wanted to go. The petitioner then pulled out a gun, but Mrs. Turner started screaming and grabbed petitioner's hand. Miss Bey tried to run, but petitioner shot her in the back, probably putting her in a wheelchair for the rest

of her life. Although she had fallen to the ground, Miss Bey looked up and saw the petitioner shoot Mrs. Turner in the neck. (Tr. at 30-32). Mrs. Turner died, and a post-mortem examination indicated that the cause of death was a severe hemorrhage from the gunshot wound to the neck. (Tr. at 23).

A Richmond police detective testified that he had found a man's hat in the front seat of the murder vehicle shortly after arriving on the scene. (Tr. at 43). Miss Bey identified the hat as belonging to petitioner and testified that he was wearing it on January 4th. (Tr. at 28).

The defense consisted entirely of petitioner's two brothers, sister, and mother, all testifying that petitioner had been at his mother's house at the time of the shooting. (Tr. at 51-101). In rebuttal, however, police detective Gery testified that the day after the shooting, and after being advised of his "Miranda"[1] rights, the petitioner claimed that he had spent the evening of January 4th at a beer joint called Gregory's. (Tr. at 116-118).

QUESTION PRESENTED

Whether A Case With No Important Question Of Federal Law, And Involving No Conflict Of Decision Between The Opinion In The Present Case And Any Decision Of This Court, Should Be Reviewed?

STATEMENT OF THE CASE

On May 19, 1977, the Petitioner was tried before a jury in the Circuit Court for the City of Richmond, Division II,

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[1] Miranda v. Arizona, 384 U.S. 436 (1966)

found guilty, and sentenced to life imprisonment in the Penitentiary for murder in the first degree, twenty years for malicious wounding, and one year for using a firearm in the commission of a felony.

Petitioner noted an appeal of his convictions to the Supreme Court of Virginia. On December 13, 1977, the Supreme Court of Virginia affirmed petitioner's convictions without an Opinion.

Petitioner then petitioned the United States District Court for the Eastern District of Virginia for a writ of habeas corpus; this petition was denied on March 16, 1979.

Petitioner appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit which affirmed the lower court's decision on October 18, 1979, and denied petitioner a rehearing on November 20, 1979.

ARGUMENT

THIS CASE IS NOT THE TYPE WHICH CALLS FOR INVOCATION OF THIS COURT'S CERTIORARI POWER.

Although this Court has broad statutory authority to review petitions for writ of certiorari, a petition will be granted only where there are special and important reasons therefor. Rule 19, Rules of the Supreme Court of the United States; Rice v. Sious City Memorial Park Cemetery, Inc., et al., 349 U.S. 70 (1954). In the case at bar, the petitioner is raising issues dealing with the admission and overall sufficiency of evidence. Neither of these issues is new or novel, both have

been fully explored by this Court, and there is no conflict between the federal circuits as to their treatment.

The thrust of petitioner's first argument is that his convictions were obtained by a violation of the privilege against self-incrimination in that the trial court erred in admitting a prior statement of the petitioner that was inconsistent with his alibi defense when he himself did not testify.

Initially, the Respondent would note that, although Petitioner claims here that there was no proof that he had been advised of his "Miranda" rights before making the statement in question, the trial record shows that the police detective testified that Petitioner was so advised:

> Q. Did you advise him of certain constitutional rights?
>
> A. I did, sir.
>
> Q. Did you advise him with reference to this particular incident in question?
>
> A. Yes, sir. I advised him of his constitutional rights, and also the charges that were placed against him. (Tr. at 116).

In fact, not only did the detective so testify, but Petitioner's counsel stipulated to the advisal:

> Mr. Simmons: We will stipulate that he was properly advised.
>
> The Court: Under Miranda versus Arizona?
>
> Mr. Simmons: Yes, sir. (Tr. at 116-117).

As for the admissibility of the statement in question, it is well established that the admissibility of evidence is a matter of state law and does not generally involve a federal constitutional question. Grundler v. North Carolina, 283 F.2d 798 (4th Cir. 1960); United States Ex Rel Bleimehl v. Cannon, 525 F.2d 414 (7th Cir. 1975); Schaefer v. Leone, 443 F.2d 182 (2d Cir. 1971); Atwell v. State of Arkansas, 426 F.2d 912 (8th Cir. 1970); LaBrasca v. Misterly, 423 F.2d 708 (9th Cir. 1970). Here, of course, the Supreme Court of Virginia concluded, on this exact point, that no error had been made by the trial court. See petitioner's Appendix "C".

It is only in situations impugning fundamental fairness or infringing upon specific constitutional protections that a federal question is presented. Freeman v. Slayton, 550 F.2d 909 (4th Cir. 1977). This Court has held in a different context, however, that, even if an error of state law has occurred, every such decision by a state court does not rise to the level of federal constitutional magnitude. Gryger v. Burke, 334 U.S. 728 (1948).

In any event, it is clear that the trial court's admission of petitioner's previous statement was not erroneous under Virginia law. Extra-judicial statements such as the petitioner's are statements made outside the scope of court proceedings; they are evidential admissions and are admissible against the pronouncing party as an exception to the hearsay rule. See Tyree v. Lariew, 208 Va. 382, 158 S.E.2d 140 (1967). Indeed,

such an admission "...affords evidence of a most satisfactory nature and may furnish the strongest and most convincing evidence of truth." Id. at 385.

Party admissions, furthermore, need not be against the party's interest when made, but will be against the party's interest at the time of trial. C. FRIEND, LAW OF EVIDENCE IN VIRGINIA § 251 (1977).[2] This exception to the hearsay rule applies in both civil and criminal cases. See Land v. Commonwealth, 211 Va. 223, 222 S.E.2d 12 (1970). Where the admission is made by a defendant in a criminal case such as here, it is called a confession. FRIEND, supra, at 467.

The Respondent respectfully submits, therefore, that petitioner's prior statement was properly admitted under Virginia law, and that his due process rights were clearly not violated.

As to petitioner's allegation concerning the overall sufficiency of the evidence at his trial, there was eyewitness evidence of his murder of the victim, and direct evidence of his malicious wounding of Miss Bey and his use of a firearm; (Tr. at 30-31); furthermore, physical evidence was found placing petitioner at the scene. (Tr. at 28, 43).

Even disregarding petitioner's prior statement, it is respectfully submitted that any rational trier of fact could have found petitioner guilty beyond a reasonable doubt, and

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2 In the instant case, the statement in question was made prior to trial, but was introduced at trial as rebuttal evidence in response to petitioner's alibi defense. (Tr. at 117-118).

that the constitutional standard for measuring the sufficiency of evidence under Jackson v. Virginia, ____ U.S. ____, 99 S.Ct. 2781, 61 L.Ed.2d 560 (June 28, 1979), has clearly been met as concluded by the United States Court of Appeals for the Fourth Circuit. See petitioner's Appendix "A".

CONCLUSION

For the reasons presented, the respondent respectfully submits that the issues raised in this case are neither important nor substantial, and that the Court should deny the petition for writ of certiorari.

Respectfully submitted,

MARSHALL COLEMAN
Attorney General of Virginia

Richard B. Smith

RICHARD B. SMITH
Assistant Attorney General

Supreme Court-State Library Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

This is to certify that I, Richard B. Smith, Assistant Attorney General of Virginia, am a member of the Bar of the Supreme Court of the United States, and that on this 19th day of March, 1980, I mailed, with first class postage prepaid, a copy of the Respondent's Brief in Opposition to Grant of Certiorari to Roosevelt Esau Turner, #112234, P. O. Box 27264, Richmond, Virginia 23261.

Richard B. Smith

Richard B. Smith
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED

MAR 16 1979

CLERK, U. S. DIST. COURT
RICHMOND, VA.

ROOSEVELT E. TURNER, Petitioner,	)	
	)	Civil Action No.
v.	)	
	)	78-0551-R
ROBERT A. YOUNG, Warden, Respondent.	)	

ORDER

For the reasons stated in the memorandum of the Court this day filed and deeming it proper so to do, it is ADJUDGED and ORDERED that the instant petition for a writ of habeas corpus be, and the same is hereby denied, and this action stands dismissed.

Should petitioner desire to appeal, written notice of appeal must be filed with the Clerk of this Court within thirty (30) days of this date.

In the event no such appeal is noted the Clerk is directed to return the state court records to their appropriate repository.

Let the Clerk send copies of this order and the memorandum to petitioner and to the Attorney General of Virginia.

/s/ [illegible]
UNITED STATES DISTRICT JUDGE

Date: MAR 16 1979

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED
MAR 16 1979
CLERK, U. S. DIST. COURT
RICHMOND, VA.

ROOSEVELT E. TURNER,
Petitioner,

v.

ROBERT A. YOUNG, Warden,
Respondent.

Civil Action No.
78-0551-R

MEMORANDUM

Roosevelt E. Turner, an inmate confined at the Virginia State Penitentiary, proceeding pro se, brings this petition for a writ of habeas corpus in forma pauperis under 28 U.S.C. § 2254 (1970). Jurisdiction vests in this court pursuant to 28 U.S.C. § 2241(a). Respondent has replied to petitioner's complaint with a motion to dismiss, to which the petitioner has responded. The matter is therefore ripe for disposition.

Petitioner is attacking the validity of his convictions for murder, malicious wounding, and felonious use of a firearm in the commission of a felony. Petitioner makes the following allegations in his petition: (1) that his conviction was obtained by a violation of the privilege against self-incrimination in that the court erred in admitting a prior statement of petitioner that was inconsistent with his alibi defense when he himself did not testify; and (2) that the evidence was insufficient as a matter of law to sustain the convictions. After due consideration of petitioner's claims and inspection of the transcript and record of the convictions aforesaid, the Court is of the opinion that the petition for a writ of habeas corpus must be denied for the following reasons.

The trial transcript reveals that evidence was admitted that the decedent sustained her wounds at approximately 8:00 p.m. on January 4, 1977. Petitioner put forth the defense of alibi at trial. Petitioner's brother, Samuel Turner, Jr., testified that he took the petitioner to their mother's home in Chesterfield County the evening of January 4, 1977 at

approximately 7:00 p.m., arriving at approximately 7:30 p.m. Petitioner's sister, Helen Conner, testified that she was at her mother's home on January 4, 1977 and saw the petitioner arrive "about 7:30 p.m." Mrs. Conner further testified that the petitioner stayed at his mother's home until "about something after 11:00," when she took petitioner back to Richmond. This testimony was corroborated by another sister, Juanita Turner, and petitioner's mother, Audrey Turner. As a rebuttal witness, the Commonwealth called Donald C. Gery, a police officer assigned to the Detective Division, Richmond Bureau of Police. Detective Gery testified that on January 5, 1977, the morning following the shootings leading to the charges against petitioner, he, Gery, interviewed the petitioner at police headquarters after petitioner had been placed under arrest, advised him of the charges against him, and advised him of his constitutional rights under Miranda v. Arizona, 384 U.S. 436 (1966). Detective Gery stated that at that interview the petitioner told him "that he knew nothing about the shootings, and that he was in Gregory's" beer dispensory the entire evening of January 4, 1977. Petitioner alleges that since he himself did not testify in his own defense the trial court erred in admitting Detective Gery's testimony.

Petitioner's allegation is without merit. His decision not to testify in no way prevents the prosecution from putting on evidence of what he may have told the police, provided that the interrogation was in all respects consistent with the dictates of the Fifth, Sixth, and Fourteenth Amendments. Petitioner alleges no violation by the police of the rights secured by these amendments. Accordingly, exculpatory statements petitioner may have made upon his arrest are fairly admissable to rebut any conflicting testimony introduced in petitioner's defense, regardless of whether petitioner takes the stand.

Petitioner next claims that the evidence was insufficent as a matter of law to sustain his conviction. It is firmly established that "[w]hen the sufficiency of the evidence supporting a state conviction is challenged by way of federal habeas corpus, the sole constitutional question is whether the conviction rests upon any evidence at all." Williams v. Peyton, 414 F.2d 776, 777 (4th Cir. 1969) (citing Young v. Boles, 343 F.2d 136 (4th Cir. 1965)). This Court cannot conceive of a case where the aforementioned standard could be more amply satisfied than the instant one. An eye witness to the shootings testified that on the night of January 4, 1977, she was driving an automobile occupied by her mother and the petitioner (her stepfather); her mother ordered her to pull the car over and that before she could do so the petitioner produced a gun, her mother commenced to scream, grabbed the petitioner's hand and stated "[O]h my God, please don't hurt my daughter." The witness, Mrs. Bay, testified that she parked the car, reached up her hand, and petitioner shot her in the hand; that she then stepped out of the car, and the petitioner shot her in the back, leaving her crippled for life. Mrs. Bay further testified that after she fell to the ground, she looked up and saw the petitioner grab her mother and shoot her in the neck. The Court holds that this eye witness account is at the very least evidence supporting the state court conviction and thus satisfies the standard proscribed by Williams v. Peyton, supra. Accordingly, as to petitioner's claim that the evidence is sufficient as a matter of law to sustain his conviction, the

respondent's motion to dismiss will be granted.

An appropriate order shall issue.

UNITED STATES DISTRICT JUDGE

Date: MAR 16 1979